IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

FRIDAY, THE 30TH MARCH 2007 / 9TH CHAITHRA 1929

OP.No. 19240 of 2001(M)

PETITIONER:

KANNANCHERY ABDU,
SON OF KUNHIMOIDEEN,
KOLATHUPARAMBA,
P.O. PUTHUR, VIA. KOTTAKKAL,
MALAPPURAM DISTRICT.

BY ADV. SRI.B.KUMAR (SR)
SRI.R.RAJESH KORMATH
SRI.ANISH S.AMBADY
SMT.BIJIMOL JOSE
SMT.PREETHY KARUNAKARAN

RESPONDENTS:
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1. THE COMPETENT AUTHORITY,
SMUGGLERS AND FOREIGN EXCHANGE
MANIPULATORS (FORFEITURE OF PROPERTY),
ACT 1976,
'UTSAV', NO. 64/01, G.N.CHETTY ROAD,
T.NAGAR, CHENNAI - 600 017.

2. THE APPELLATE TRIBUNAL FOR FORFEITED PROPERTY,
4TH FLOOR, LOK NAYAK BHAVAN,
KHAN MARKET,
NEW DELHI - 110 003.

3. THE GOVERNMENT OF INDIA,
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
NEW DELHI.

BY ADV. SRI.JOHN VARGHESE, ASSISTANT SG
BY ADV. SRI.P.K.RAMKUMAR, ADDL.CGSC
SRI.JAYAPRADEEP. V., ADDL.CGSC

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD
ON 30/03/2007, ALONG WITH O.P. NOS. 19386, 19387/2001 & CONNECTED CASES,
THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

OP NO. 19240/2001

ORDER ON CMP NO. 31140/2001 IN OP 19240/2001

DISMISSED.

30/03/2007 SD/- (C.N.RAMACHANDRAN NAIR, JUDGE)

APPENDIX

PETITIONER'S EXHIBITS

P1 : COPY OF THE ORDER DATED 30/06/1998 PASSED BY THE 1ST RESPONDENT COMPETENT AUTHORITY.

P2 : COPY OF THE COMMON ORDER DATED 20/02/2001 PASSED BY THE 2ND RESPONDENT APPELLATE TRIBUNAL.

P3 : COPY OF THE AQUITTANCE ROLL OF POOVAT MOPLA SCHOOL FOR THE MONTHS OF AUGUST, JULY, OCTOBLER, SEPTEMBER, DECEMBER AND NOVEMBER OF 1939 AND FEBRUARY, JANUARY, APRIL AND MARCH 1940.

P4 : COPY OF THE CERTIFICATE DATED 28/05/2001 ISSUED BY H.H. THE RULER'S COURT OF THE GOVERNMENT OF DUBAI.

// TRUE COPY //

PA TO JUDGE.

C.N.RAMACHANDRAN NAIR,J.

O.P. NO. 19240, 19386, 19387 & 19388 OF 2001

Dated this the 30th day of March, 2007

JUDGMENT

These connected O.Ps. are filed challenging the orders of forfeiture of various items of properties, both movable and immovable, under Section 7 of the Smugglers and Foreign Exchange Manipulators (forfeiture of property) Act, 1976, hereinafter called the "Act", confirmed vide Ext.P2 order in appeals by the Appellate Tribunal constituted under the Act. Even though the proposal in the forfeiture notice issued under Section 7(1) of the Act was in respect of several items of landed properties with building thereon, vehicles and deposits in Bank accounts, the competent authority accepted the explanation of the petitioners in respect of three items of landed properties at Cherukunnu, totally comprising an extent of 1.93 acres, and excluded the same from forfeiture. Accordingly forfeiture was limited to 31 items of properties referred to in Ext.P1 which comprises mostly of landed properties. The affected persons who are brothers are petitioners in O.P.Nos. 19240, 19386 and 19388 of 2001. O.P.No.

19387 of 2001 was filed by the same petitioners in the said OPs. along with other legal heirs of late Sri. Kunju Moideen and late Smt. Pathukutty against whose property also proceedings of forfeiture were initiated under the impugned proceedings. While father of the petitioners, Sri. Kunju Moideen, died prior to initiation of proceedings, petitioners' mother Smt. Pathukutty died after initiation of proceedings, but during the pendency of the proceedings under Section 7(1) of the Act. Separate appeals filed by affected persons were disposed of by common order, Ext.P2 produced in all the OPs. While the Appellate Authority allowed appeals in respect of 19 cents of land at Cherukunnu that was in the name of the deceased mother of the petitioners, the appeals pertaining to forfeiture of all other properties were rejected. It is against Ext.P1 order confirmed by Ext.P2 that these O.Ps. are filed by affected persons.

2. I have heard Sri. B. Kumar, senior counsel appearing for the petitioners and Sri. John Varghese, Asst. Solicitor General, appearing for the respondents.

3. Counsel for the petitioners relying on the decisions of the

Supreme Court in Kesar Devi's case reported in (2003) 7 SCC 427 and P.P.Abdulla's case reported in 2007 AIR SCW 946 and contended that proceedings under Section 7(1) of the Act could be initiated only after recording reasons under section 6 (1) of the Act. The Asst. Solicitor General appearing for the respondents referring to various decisions of the Supreme Court including the Constitution Bench decision reported in (1994) 5 SCC 54 and contended that there is no need to furnish reasons for initiating proceedings under Section 7(1) of the Act and all what is required under the decision of the Supreme Court is to record reasons before initiation of proceedings. The Asst. Solicitor General at the time of hearing the OPs. furnished copies of notices issued under Section 7(1) and also along with it the reasons for issuing notices recorded under Section 6(1) of the Act. The Supreme Court in the decisions referred above have stated that it is enough the respondents record reasons and produce the same before Court to convince it. The technical objection raised by the petitioners that reasons are not recorded under section 6 (1) of the Act before initiation of proceedings under Section 7(1) is rejected because copies of such

notices are produced by the Asst. Solicitor General in Court.

4. The next ground pertains to merits of the case. It is well settled legal position that onus of proof that is source for acquisition of property is on the person affected. It is conceded that the petitioner in O.P.No. 19240 of 2001, Sri. Abdu, who is first petitioner in O.P.No. 19387 of 2001, was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter called the "COFEPOSA Act" during 1984. The involvement of Sri. Abdu in the gold smuggling case which led to his detention is a reason for initiation of proceedings under Section 7(1) of the Act. The other two brothers, who are petitioners respectively in O.P.Nos. 19386 & 19388 of 2001, were also booked for various periods. The properties involved against which proceedings were initiated are in the name of these persons. The Department has initiated proceedings based on the presumption available under Sections 6 and 7 of the Act that unexplained properties are liable for forfeiture. The legal position that onus of proof that the properties against which proceedings are initiated were acquired with properly earned income of

the person against whom proceedings are initiated is on them. Therefore the question to be considered is whether the petitioners have discharged their burden of prooving the same. While the case of the petitioners is that entire source of acquisition of properties is through foreign remittances through NRE accounts and withdrawal therefrom, the Asst. Solicitor General appearing for the respondents contended that persons affected have not established before the Original Authority or the Appellate Tribunal or even before this Court any materials to connect the withdrawals with investments. Moreover no details are furnished about the source of income from abroad, the bank accounts maintained abroad and remittance of money to the NRE Accounts maintained in India. Further more, Sri. Abdu, who was detained in prison under the COFEPOSA Act and who was stated to have reached Dubai first, and thereafter his other two brothers, has not furnished any details of alleged business he and his two brothers carried on there. In fact the argument in this regard at one stage is that the persons affected have started business in Dubai along with partners there, and at another stage they took the stand that they were employed under the foreign

employer. In any case, they have not furnished any material whatsoever regarding the nature of employment or business carried on, the bank accounts maintained by them, etc., abroad. In the circumstances, petitioners have miserably failed to establish the source of income for acquisition of impugned properties, except in regard to one item of property that is 3.09 acres of land referred to as item 31 in the impugned order. Therefore I uphold the order of the original authority and that of the Tribunal except in regard to item No. 31 of Ext.P1, i.e., 3.09 acres of land and a building thereon at Cherukunnu.

5. So far as the property referred to as item 31 in Ext.P1 is concerned, it is an accepted position that the said property was acquired by late father of the petitioners, who was stated to be a teacher, in the year 1960. In fact the property was originally in the joint names of petitioner's late father and two of his brothers, while one of his brothers relinquished his share in favour of the petitioners' late father, the other retained. Therefore this property was in the joint name of petitioners' late father and one of his brothers. I do not think this property can be brought within the scope of proceedings under Sections 6 and 7 of the

Act because it was acquired in 1960 when Abdu against whom smuggling case was booked was only around 18 years of age, and even according to respondents he had not gone abroad at that time. Therefore this property cannot be brought within the purview of Sections 6 and 7 of the Act. However, the Asst. Solicitor General brought to my notice that the house is built in the said property during 1979-82 with the investments of petitioners, source of which is not known nor explained. I find force in this contention. However, the improvement in that property does not attract acquisition as such, but it is a case maximum for penalty under Section 9 of the Act. Since the competent authority has not considered application of Section 9 pertaining to investment in the house in this property, I set aside the impugned orders with regard to forfeiture of this item of property, that is 3.09 acres of land in Cherukunnu that is covered by item 31 of Schedule to Ext.P1 with direction to the competent authority to exclude the same from the operation of Sections 6 and 7 of the Act, and to consider levy of penalty based on Section 9 of the Act pertaining to investment in the building. It is upto him to consider whether penalty

should be based on investment or should be based on current value of the property. In any case, before fine is imposed, he should issue notice proposing fine, giving reasons therefor, hear petitioners' objections and orders should be passed thereafter.

O.Ps. are accordingly disposed of upholding the impugned orders except in regard to item No.31 of Schedule to Ext.P1.

(C.N.RAMACHANDRAN NAIR)
Judge